

# International Law in the Age of Bilateralism

Eyal Benvenisti\*

## Introduction

It has become clear that the world's two major powers, the US and China, have less appetite to multilateral international organizations. Instead, both seem to prefer webs of bilateral agreements they each negotiate with third parties. Those who believe that President Trump is an outlier<sup>1</sup> must account for the fact that previous administrations have also pursued a similar strategy. China has been following and to a certain extent even perfected what is essentially a “divide and rule” strategy by employing different types of bilateral legal instruments, including informal MOUs and private law contracts.

These recent moves invite several questions, among them: What explains the rise of multilateralism post 1945? What explains what seems to be in recent years as fading hegemonic support for multilateral institutions? Could there be alternatives to inter-governmental multilateralism? This work in progress seeks to offer a number of hypotheses. It does so by tracing and seeking to explain the move from a post-1945 American preference for multilateralism to the recent turn to bilateralism and what seems like the perfection of the bilateralist approach by the Chinese Belt and Road Initiative (BRI). Finally, the paper will reflect on the possible ramifications of hegemonic bilateralism on other forms of multilateralism and on the future of international law.

## I. Is Intergovernmental Multilateralism Fading?

It has become clear that the world's two major powers, the US and China, are poised to shun multilateral international organisations and instead pursue webs of bilateral agreements with third parties. The Trump administration has clearly asserted its preference for bilateral deals

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\*Whewell Professor of International Law, University of Cambridge, C C Ng Fellow, Jesus College, Cambridge, Visiting Professor, The Hebrew University of Jerusalem. I thank Tom Grant, Doreen Lustig, Alex Rodiles, participants in (Geneva)...

<sup>1</sup> Koh, OUP 2018. For a more nuanced assessment see Jack Goldsmith and Shannon Togawa Mercer, *International Law and Institutions in the Trump Era*, German Yearbook of International Law, forthcoming 2019.

while dismissing multilateral international organisations as taking advantage of US generosity,<sup>2</sup> aiming specific ire at the US's traditional allies, members of NATO and the G-7, who had served as the US's unilateral group partners within multilateral organizations since 1945.<sup>3</sup> Indeed, Trump regards trade deals as inherently “adversarial and zero-sum,”<sup>4</sup> and has blatantly disregarded the multilateral trade rules the US had set during the victorious post-Cold War days.<sup>5</sup> Even the free trade area agreement between America and its immediate neighbours was transformed initially into a bilateral agreement<sup>6</sup> in a renegotiation process that excluded Canada. Canada was thus hard-pressed to make significant concessions to join the other two members of the “US-Mexico-Canada-Agreement,”<sup>7</sup> and the fact that this agreement is subject to review every six years is seen by key participants, such as the former Agriculture Secretary for President Obama, as a tool to ensure compliance by the Canadians with US demands.<sup>8</sup> The looming US-Japan trade deal promises significant concessions by Japan, raising questions about the consistency of this agreement with WTO rules.<sup>9</sup>

Those who believe that President Trump is an outlier and that, following imminent impeachment or elections, the US would soon resume its responsible global leadership position, must account for the fact the Obama Administration has pursued the same divide and rule strategy<sup>10</sup> when negotiating the major Trans Pacific Partnership (TPP)<sup>11</sup> and the Transatlantic

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<sup>2</sup> Eli Watkins, Haley touts reduced UN budget CNN (2017), <https://www.cnn.com/2017/12/26/politics/nikki-haley-un-budget/index.html> (last visited Nov 3, 2018).

<sup>3</sup> Miles Kahler, *Multilateralism with small and large numbers*, 46 INTERNATIONAL ORGANIZATION 681 (1992)

<sup>4</sup> Donald Trump's trade bluster, THE ECONOMIST (2016), <https://www.economist.com/briefing/2016/12/10/donald-trumps-trade-bluster> (last visited Nov 3, 2018).

<sup>5</sup> Tom Miles, WTO CHIEF MAKES RARE WARNING OF TRADE WAR OVER U.S. TARIFF PLAN REUTERS (2018), <https://www.reuters.com/article/us-usa-trade-wto/wto-chief-makes-rare-warning-of-trade-war-over-u-s-tariff-plan-idUSKCN1GE28P> (last visited Nov 3, 2018).

<sup>6</sup> Ana Swanson et al., *Trump Reaches Revised Trade Deal With Mexico, Threatening to Leave Out Canada*, THE NEW YORK TIMES, Aug. 28, 2018, <https://www.nytimes.com/2018/08/27/us/politics/us-mexico-nafta-deal.html> (last visited Oct 31, 2018)

<sup>7</sup> <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico>. For a Mexican perspective see: Alejandro Rodiles, *After TPP is Before TPP: Mexican Politics for Economic Globalization and the Lost Chance for Reflection*, Working Paper 2018/1 IILJ 18 (2018)

<sup>8</sup> According to Inside US Trade, Tom Vilsack said that “We’ve had situations in the past where games have been played by the Canadians [...] If they were to play games, the idea that the agreement can be reviewed periodically gives us an opportunity to raise issues on a more regular basis than was the case with NAFTA”. For Trump policies in other areas of international law see Goldsmith *supra*.

<sup>9</sup> International Economic Law and Policy Blog - News Reports About the U.S.-Japan Trade Deal Raise Some Questions 26.8.2019.

<sup>10</sup> Eyal Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law*, 23 CONSTELLATIONS 58 (2016)

<sup>11</sup> Trans-Pacific Partnership (TPP) (2016) <http://tpp.mfat.govt.nz/text>

Trade and Investment Partnership (TTIP)<sup>12</sup> agreements, when it divided the European Union and 11 carefully selected Pacific Rim countries and negotiated with each group separately, and presenting the EU with almost a *fait accompli* after finalizing the TPP.<sup>13</sup> It was the Obama administration which began the current challenge to the WTO AB's independence.<sup>14</sup> President Obama's predecessor, George W. Bush, promoted reliance on bilateral trade and investment agreements, loose partnerships and fluid "coalitions of the willing," instead of working within or creating new multilateral institutions.<sup>15</sup> Indeed, in the immediate post 1945 era, the US embarked on an elaborate effort to create a wide array of multilateral international organisations which was crucial for establishing its dominance and for the rise of the post-war liberal international order (in addition to bilateral defence agreements with its allies).<sup>16</sup> In the post-post-Cold War era, the superpower, whose hegemony is increasingly being tested, may have found multilateralism burdensome.

It is also unsurprising that the rising Asian hegemon has been exploring its own path of bilateralism. In October 2007, stridently ascending to global dominance, China declared bilateral free trade agreements (FTAs) to be its basic international economic strategy.<sup>17</sup> Despite the fact that, as some scholars have noted,<sup>18</sup> America's disengagement from multilateralism could not offer "a more favourable scenario for a rising power wishing to reshape the international system," With the exception of the Asian Infrastructure Investment Bank (AIIB), with which China sought to attract foreign money and was "caught unawares" by the unexpected wide reception,<sup>19</sup> China did not rush to set up multilateral bodies with global reach.<sup>20</sup> Instead, it has

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<sup>12</sup> Transatlantic Trade and Investment Partnership (T-TIP) <https://ustr.gov/ttip>

<sup>13</sup> Benvenisti, *supra* note 7.

<sup>14</sup> Gregory Shaffer, Manfred Elsig, Mark Pollack U.S. Threats to the WTO Appellate Body (SSRN).

<sup>15</sup> ALEJANDRO RODILES, COALITIONS WILLING AND INTERNATIONAL LAW INTERPLAY BETWEEN FORMALITY AND INFORMALITY (2018).

<sup>16</sup> Kahler, *supra* note 2.

<sup>17</sup> Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 755 (2013)

<sup>18</sup> G. John Ikenberry & Darren J Lim, *China's emerging institutional statecraft*, 27 BROOKINGS INSTITUTION (2017).

<sup>19</sup> Jamil Anderlini, 'UK Move to Join China-led Bank a Surprise Even to Beijing', Financial Times, 27 March, 2015, <https://www.ft.com/content/d33fed8a-d3a1-11e4-a9d3-00144feab7de>. See Jan Knoerich and Francisco Urduinez, Contesting Contested Multilateralism: Why the West Joined the Rest in Founding the Asian Infrastructure Investment Bank, *The Chinese Journal of International Politics*, 2019, 333, 335 ("the organization needed creditor countries that would transform the AIIB into a global organization with a more heterogeneous membership"). Hence the AIIB reflects the logic of multilateral institutions explained below.

<sup>20</sup> Among the notable exceptions of particular interest is the Asian Infrastructure Investment Bank (AIIB), which allows China to reduce the lending risk of its foreign investments by involving investors from third countries. But

been carefully perfecting its own version of bilateralism, recognized by some as based on the “hub and spokes” model,<sup>21</sup> an architecture that allows China at the hub to maintain supremacy over its numerous partners who are kept apart from each other. This model characterizes its security and other arrangements in Asia,<sup>22</sup> and shapes China’s most ambitious economic (and political) initiative, the Belt and Road Initiative<sup>23</sup> (BRI) that connects China with more than sixty selected partners<sup>24</sup> that are spread across three continents.

China’s dominance over its spokes is legally secured through a China-centric web of bilateral treaties, as well as other tools that include private contracts and soft-law instruments such as non-binding joint communiqués, joint statements, MOA, MOUs, letters of intent,<sup>25</sup> and a newly minted Chinese dispute settlement mechanism<sup>26</sup> designed to resolve investment disputes arising out of the implementation of the BRI and indirectly regulate<sup>27</sup> BRI-related projects within its partner countries thereby shaping those countries’ regulatory frameworks. The hub and spoke architecture allows these arbitral tribunals to tailor distinctive norms to suit the unique situation within each of the spoke countries, consistent with Chinese interests.

Of course, there is nothing new in bilateralism. As a League of Nations report indicated, when in 1931 the system of multilateral trade broke down with the collapse of the world monetary system, states turned to *sui generis* bilateral agreements.<sup>28</sup> No one exploited this

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even the multilateral AIIB is to expand its bilateral relationships with recipient states: Ikenberry & Lim, *supra* note 14, at p. 11.

<sup>21</sup> Richard E. Baldwin, *The Spoke Trap: Hub-and-Spoke Bilateralism in East Asia*, in CHINA, ASIA, AND THE NEW WORLD ECONOMY, (Barry Eichengreen, Yung Chul Park, and Charles Wyplosz Eds, 2008).

<sup>22</sup> Lee Jaehyon, CHINA IS RECREATING THE AMERICAN “HUB-AND-SPOKE” SYSTEM IN ASIA, THE DIPLOMAT, <https://thediplomat.com/2015/09/china-is-recreating-the-american-hub-and-spoke-system-in-asia/> (last visited Nov 1, 2018).

<sup>23</sup> Belt & Road Portal, BELT AND ROAD PORTAL, <https://eng.yidaiyilu.gov.cn/> (last visited Nov 3, 2018).

<sup>24</sup> For the list of partners, see: Profiles, BELT AND ROAD PORTAL, [https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10076&cur\\_page=1](https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076&cur_page=1) (last visited Nov 3, 2018).

<sup>25</sup> See List of [283] Deliverables of the Second Belt and Road Forum for International Cooperation <http://www.beltandroadforum.org/english/n100/2019/0427/c36-1312.html> ; China’s Approach to the Belt and Road Initiative: Scope, Character and Sustainability/ By Heng Wang <https://academic.oup.com/jiel/article-abstract/22/1/29/5272447> Wade Shepard, What Happened On China’s New Silk Road In 2017 Forbes (2017), <https://www.forbes.com/sites/wadeshepard/2017/12/20/what-happened-on-chinas-new-silk-road-in-2017/#2aac380d72e9> (last visited Nov 2, 2018).

<sup>26</sup> Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions, CHINA INTERNATIONAL COMMERCIAL COURT (CICC), <http://cicc.court.gov.cn/html/1/219/208/210/819.html> (last visited Nov 3, 2018).

<sup>27</sup> Huiping Chen, *China’s Innovative ISDS Mechanisms and their Implications*, 112 AJIL UNBOUND 207 (2018).

<sup>28</sup> Robert Mark Spaulding, German Trade Policy in Eastern Europe, 1890-1990: Preconditions for Applying International Trade Leverage, 45 Int. Org. 343 (1991); Larry Neal, The Economics and Finance of Bilateral Clearing

strategy better than Nazi Germany, as “it facilitated Germany's exertion of trade pressure on individual East European states” by creating economic dependency by each of the Balkan spokes on the German economic hub.<sup>29</sup>

In fact, the pertinent question is: why the turn to multilateralism?

## **II. Fading Intergovernmental Multilateralism: Causes**

In “After Hegemony,”<sup>30</sup> Robert Keohane famously express the prediction, shared by many of his contemporaries,<sup>31</sup> that multilateral institutions will continue to flourish in global politics given the common interest in cooperation. These scholars could find support in game theoretical, field studies and computer-based predictions that highlighted the logic of collective action.<sup>32</sup> But these insights did not pay much attention to power dynamics<sup>33</sup> and lumped all IOs, those that resolve commons problems, those that regulate trade and those that lend to developing countries, together. Perhaps because of this they could not anticipate the US’s turning away from multilateralism and China’s reluctance to step in.<sup>34</sup> Clearly something was missing in an analysis that borrowed from an economic theory about asymmetric information without addressing the interests and concerns of some members of the community – indeed, the most powerful of them – that are vying for domination. While multilateralism may be conducive to achieving common goods such as getting rid of chemical stockpiles or cleaning up a shared lake, multilateralism may be counterproductive for hegemons who seek to secure their influence. While multilateralism offers certain benefits to a dominant actor, especially if that actor seeks to build a

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Agreements: Germany, 1934-8, 32 *Economic History Review*, New Series, 391 (1979). Albert O. Hirschman's *National Power and the Structure of Foreign Trade* (1945).

<sup>29</sup> “Germany's Trade Offensive,” *The Economist*, November 5, 1938 (the countries of Southeastern Europe were virtually forced to continue sales to Germany, partly because the Reich offered prices for their agricultural products above the world market level and partly because German activities made it difficult for them to sell elsewhere.)

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<sup>31</sup> Oye, Krasner, Moravcsik; Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda* 87 *AJIL* (1993).

<sup>32</sup> Mancur Olson, Robert Axelrod, Elinor Ostrom Robert O. Keohane, *The Demand for International Regimes* 36 *International Organization*, 325 (1982)

<sup>33</sup> For criticism see Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 *J. CONF. RES.* 3 (1998).

<sup>34</sup> G. John Ikenberry, *The end of liberal international order?* 94 *INTERNATIONAL AFFAIRS* 7 (2018); see also Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State* in *MULTILATERALISM MATTERS* (JOHN G. RUGGIE, ED., 1992);

coalition against a formidable competitor (eg., US after WWII),<sup>35</sup> multilateralism might disproportionately burden the same powerful actor as it bears a disproportionately larger share of the costs of maintaining the institution while others free ride on its efforts. As Mancur Olson has shown,<sup>36</sup> multilateralism often requires a hegemon powerful enough to carry the collective burden. Common interest in cooperation is not enough.

But did multilateralism ever reflected a common interest in cooperation? Perhaps the story of multilateralism is different: it always reflected the interest of the hegemon. It was set up by hegemons in pursuit of their own interests; and when they could no longer steer it to their ends – either because they can't sustain it or because they can't control its policies – they opted for bilateralism.

*(a) Why Hegemons Opt for Multilateralism?*

The short hypothesis is – hegemons control the institutions they create and hence can benefit from the contributions of the lesser actors to the collective effort.<sup>37</sup> The reason for that lies in the fact that hegemons that opt for multilateralism do so *without giving up control*. They maintain their ability to shape its policies and control its actions. Operating within a multilateral organisation allows the hegemon to save on costs of setting, monitoring and enforcing its rules. Powerful states only seemingly cede authority to multilateral organisations and subject themselves to collectively-fashioned international law that regards all states as formally equal. Multilateralism does not necessarily mean that the hegemon is precluded from playing the old divide and rule game among its partners to the international regime.

In a 2007 article,<sup>38</sup> analysing the ways a hegemon or a group of powerful states are able to shape international law and rule international institutions despite their numerical minority, the late George Downs and I highlighted the ability of powerful states to maintain their domination within multilateral international organizations by blocking the weaker member states' opportunity to act collectively in defiance of the powerful. We used a simple three person game

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<sup>35</sup> Stephen Wertheim, Instrumental Internationalism: The American Origins of the United Nations, 1940-3, *J Contemp History* (2019)

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<sup>37</sup> See Abbott & Snidal, *supra*

<sup>38</sup> Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *STAN. L. REV.* 595 (2007).

devised by Barry Weingast<sup>39</sup> that involves three players: a sovereign, S, who is the most powerful figure in the three person “society,” and two citizens, A and B. In order to remain in power, the sovereign needs the support of at least one of the two citizens. If both citizens oppose him, he is deposed and loses power.

As we described, the basic game involves a sequence of two moves. S moves first and may choose to honour both citizens’ rights or to transgress against the rights of one or both. If S chooses to honour both citizens’ rights, the game ends, and S remains in power. If S violates the rights of either or both, A and B have the opportunity to choose whether to acquiesce or challenge the sovereign. If A and B both choose to challenge the sovereign (i.e., if they cooperate), the attempted transgression fails and the game ends. If one or both chooses to acquiesce (i.e., fail to cooperate), S’s transgression succeeds and the game ends.

The cooperative outcome in which A and B cooperate to maximise their collective gain is not an equilibrium). However, if the game is repeated, cooperation between A and B becomes possible because both might find that it is worth risking the costs of cooperation in the one-time game to avoid a string of future transgressions. Thus two equilibria arise from the indefinitely repeated game: One is an asymmetric equilibrium in which S and one of the citizens repeatedly exploit the second citizen. The other is the cooperative equilibrium in which both citizens cooperate and challenge the sovereign.

As we indicated in our article, Weingast’s stylised game possesses two features that correspond to important aspects of the post-1945 international system. The first is that a powerful state could be likened to the sovereign because it possesses a notable first-mover advantage, namely the agenda-setting power that hegemon and coalitions of powerful states frequently enjoy at the international level, reflected in the final outcome of multilateral negotiations that is usually strongly anchored to their initial bargaining position. The second feature of the game that is characteristic of the post-1945 international system is that the task facing the two citizens is far more difficult than that of the sovereign. Cooperation among them requires two special conditions.

One such condition is the familiar requirement that the game must be repeated; and the other is that the citizens must be able to resolve any differences between them about the outcome of their cooperation in a manner that leaves each of them better off than they would be by

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<sup>39</sup> Barry R. Weingast, *The Constitutional Dilemma of Economic Liberty*, 19 J. ECON. PER. 89 (2005).

colluding with S. These can be very difficult conditions to meet when the preferences of the citizens diverge, and even more problematic if instead of individual citizens we have states that have different preferences (for example, one state exports oil, the other bananas, the third tourism services). In fact, Weingast views these conditions as being so formidable that the most likely outcome of the game is one in which the citizens fail to cooperate, and S and one of the two citizens exploit the other citizen.

For our purposes, the primary significance of Weingast's game lies in its message that a hegemon (or small group of powerful states) that wishes to prevent weaker states from cooperating within a certain institution or in the negotiation of a treaty can do so by using its first-mover advantage to 1) limit the perception of weaker parties that they are involved in a repeated game, and 2) limit the opportunities that weaker states have to resolve the differences in their preferences. In our article, we highlighted a number of strategies that hegemon and powerful states can use to accomplish each goal, among them the creation of a large number of international organisations (rather than a few that would have broad spectrum of responsibilities or that would include many parties).

*(b) Why Do Hegemons Shift to Bilateralism?*

The recent turn away from multilateral institutions and the embrace of bilateralism may accordingly be explained as the assessment by the powerful actor that it has lost either its agenda setting power within the organization or that it cannot prevent the weaker actors from overcoming their differences and cooperating against it. As happened in the 1970s at the U.N. General Assembly when the new member states began to collectively undermine the US's dominance, these conditions may have now matured not only due to the relative decline of the United States and the rise of competing powers, but also due to the transformative effect of globalisation on the economies of many countries, making them more integrated<sup>40</sup> and diversified, and hence more likely to have similar preferences and the assurance necessary to risk confronting the hegemon. The dramatic rise in intra-developing country (or "South-South")

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<sup>40</sup> See UNCTAD | ECONOMIC COOPERATION AND INTEGRATION AMONG DEVELOPING COUNTRIES, *Economic Cooperation and Integration among Developing Countries*, <https://unctad.org/en/pages/gds/Economic%20Cooperation%20and%20Integration%20among%20Developing%20Countries/Economic-Cooperation-and-Integration-among-Developing-Countries.aspx> (last visited Nov 2, 2018).

trade,<sup>41</sup> facilitated by multilateral rules, strengthens their cohesion further. No doubt the delegation of authority to relatively independent bureaucrats<sup>42</sup> and judges<sup>43</sup> whose jurisprudence constrained the powerful actors and enhanced the position of lesser powers within the organization further undermined the advantages that come along with relative economic power.

In recent years we have witnessed<sup>44</sup> emerging economies such as Brazil and India succeed in mobilizing developing country coalitions, “which enabled them to exercise influence above their economic weight [thereby assuming] a more aggressive and activist position in WTO negotiations than China;”<sup>45</sup> a US President “crashing”<sup>46</sup> a meeting of the Chinese, Indian, South African and Brazilian leaders who had evaded him during the dramatic final moments of the Copenhagen Climate talks; and American failures to protect domestic interests groups such as the tobacco industry<sup>47</sup> and the infant formula manufacturers at the World Health Organization.<sup>48</sup> US threats to withdraw from the Universal Postal Union while seeking to renegotiate the lower rates granted to China among other developing countries have been met with stiff resistance.<sup>49</sup>

The diversity within the IOs may have emboldened bureaucrats and judges within these IOs to enhance their authorities in ways not anticipated by the hegemonic powers that had set up these institutions. As George Downs and I observed, the independence of IO officials and judges increases the more there is political division within the IO.<sup>50</sup> As we argued, because of increased

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<sup>41</sup> Mark Wu, *Why Developing Countries Won't Negotiate: The Case of the WTO Environmental Goods Agreement*, 6 TRADE L. & DEV. 93 (2014).

<sup>42</sup> See the sad story of US's sacking of Bustani, the Director General of the OPCW in 2002

<sup>43</sup> EYAL BENVENISTI & GEORGE W. DOWNS, *BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS* (2017).

<sup>44</sup> Kristen Hopewell, *Different paths to power: The rise of Brazil, India and China at the World Trade Organization*, 22 REV. INT'L POL. ECON. 318 (2014).

<sup>45</sup> Hopewell, *id.*; Kristen Hopewell, *New Protagonists in Global Economic Governance: Brazilian Agribusiness at the WTO*, 18 NEW POLITICAL ECONOMY, 603 (2013); Eugénia da Conceição-Heldt *Emerging Powers in WTO Negotiations: The Domestic Sources of Trade Policy Preferences*, 27 INT'L TRADE J, 431 (2013); Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L.J. 483 (2007); Andrew Hurrell & Amrita Narlikar *A New Politics of Confrontation? Brazil and India in Multilateral Trade Negotiations*, 20 GLOBAL SOCIETY 415 (2006).

<sup>46</sup> *Barack Obama denies accusations that he 'crashed' secret Chinese climate change talks* The Telegraph (2009).

<sup>47</sup> H.M. Mamudu & S.A. Glantz, *Civil society and the negotiation of the Framework Convention on Tobacco Control*, 4 GLOBAL PUBLIC HEALTH 150 (2009).

<sup>48</sup> Andrew Jacobs, *Opposition to Breast-Feeding Resolution by U.S. Stuns World Health Officials* The New York Times (2018).

<sup>49</sup> The White House, Statement from the Press Secretary, 17 October 2018, available at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-38/>; Stamping on the competition <https://www.economist.com/node/21749755?frsc=dg%7Ce>

<sup>50</sup> *Between Fragmentation and Democracy: The Role of National and International Courts* (2017), Chapter 4.

inter-state competition within IOs, there is more judicial independence at the global level in recent years.

In addition, the role of domestic politics should not be underestimated. The global wave of resistance to multilateralism has been explained as the reaction of those who were left behind by global elites,<sup>51</sup> whose voice in the domestic arena has been enhanced by formal and informal tools of direct democracy such as referenda or direct communications with representatives. The unique role of ultra-rich individuals who can single-handedly shape leaders' preferences is yet to be theorized. At the same time, economic and other interest groups that initially were pushing for formal IOs to secure their interests have found even better ways to do so through informal and private governance structures.<sup>52</sup> Domestic politics also shape the Chinese approach to international cooperation, including the BRI, as demonstrated by a host of bilateral agreements that reflect the specific regional interests of nearly 32 of china's provinces.<sup>53</sup>

If this analysis is correct then we face a global space where the post 1945 legal order as we have come to experience it might be eclipsed by a myriad of periodically renegotiated bilateral, often informal and ad-hoc, inter-state agreements. No single state or group of states will have either the incentive or the power to unilaterally commit the hegemonic powers to multilateral rules or institutions that could bind them and be used against them.

This outcome is in line with Mancur Olson's observations about the emergence of collective action.<sup>54</sup> As he suggests, a community composed of unequal members is more likely to

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<sup>52</sup> Exit and Voice in the Age of Globalization; especially social media (FB); Rodiles, *supra*; Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, EUR. J. INT. L. (2014); Nico Krisch, The Decay of Consent: International Law in an Age of Global Public Goods, 108 AM. J. INT'L L. 1 (2014), Benvenisti & Downs, Empire, ; Benvenisti, "Coalitions of the Willing" and the Evolution of Informal International Law [hereinafter Benvenisti, Coalitions of the Willing], in COALITIONS OF THE WILLING - AVANTGARDE OR THREAT? 1 (C. Calliess, C. Nolte & G. Stoll eds., 2008).

<sup>53</sup> Jie Yu, The belt and road initiative: domestic interests, bureaucratic politics and the EU-China relations (2018) (discussing "the supremacy of domestic interests" as shaping BRI policies: "No discussion of major Chinese policy can ignore the ultimate aim of the Chinese Communist Party (CCP): staying in power and keeping absolute control. This requires stability and in turn requires the CCP keep its 'social contract' with ordinary Chinese people of growth and employment. BRI is no exception. ... Nearly 32 provinces across China are also participating in ensuring their preferred projects being chosen.")

<sup>54</sup> MANCUR OLSON, LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971). Robert O. Keohane & Joseph S. Nye, Transgovernmental Relations and International Organisations, 27 WORLD POL. 39 (1974). John Gerard Ruggie, Multilateralism: the anatomy of an institution, 46 INTERNATIONAL ORGANIZATION 561 (1992). see also MARK MAZOWER, GOVERNING THE WORLD: THE HISTORY OF AN IDEA (2013). ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Kal Raustiala, The

overcome collective action problems than a homogeneous community, because the powerful members of the heterogeneous community will have both the ability and the incentive to carry the collective burden unilaterally.

Herein lies the paradox: globalization, facilitated by shared norms of international law and multilateral institutions, has operated to diminish differences among countries and to increase their ability to cooperate against the more powerful states. Its success could now portend its demise, as these superpowers opt for zero-sum bilateralism and the prospects for a stable and comprehensive system of multilateral norms and institutions are diminishing.

### **III. Toward Non-State Multilateralism?**

Life under such short-term bilateralism may feel like living under despotism: unequal and unpredictable, and hence also unstable. Ultimately, bilateralism can be expected to be challenged by those who need predictability for their long-term planning and can invest resources to secure it. If a void is created by the deserting hegemon, and governments are tied as spokes to their respective hubs, perhaps the promise of multilateralism and predictability lies in other types of public actors: sub-national public actors such as local governments,<sup>55</sup> domestic courts,<sup>56</sup> and sufficiently independent regulators.<sup>57</sup> Even private actors such as multi-national corporations have resorted to cooperation across borders seeking economic certainty and the possible prevention of climate change. This new type of what may be called “infra-national multilateralism” is grounded in formal and informal, loose or tight coalitions across political boundaries.

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Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 VA. J. INT'L L. 1 (2002); David Zaring, Informal Procedure, Hard and Soft, in *International Administration*, 5 CHI. J. INT'L L. 547 (2005).

<sup>55</sup> Alex Green & Robert Jackel, WILL OTHER STATES JOIN CALIFORNIA'S INTERNATIONAL CLIMATE PACT? THE ATLANTIC (2017), <https://www.theatlantic.com/politics/archive/2017/08/california-emissions-cap-trade/536430/> (last visited Nov 2, 2018).

<sup>56</sup> Eyal Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, 102 *American Journal of International Law* 241 (2008); See also the recent judgment of the Dutch court in *The Netherlands v. The Urgenda Foundation* (2018) for its potential effect on state executives' discretion in the global arena <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>

<sup>57</sup> Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT'L L.* 114 (2009).

Companies and legislatures might also be incentivised to seek multilateral approaches due to the growing pressure to respond to emerging global challenges such as the climate and the unruly social media giants. Civil society resistance to unilateralism is growing at the grass root level (Rebellion Extinction, Greta Thunberg and the School Strike) and might create market pressures on companies or affect domestic politics in novel ways such as the newly formed coalition of parliamentarians seeking to collectively call Facebook to give account of its policies.<sup>58</sup>

Private standard setting is of course not a new phenomenon,<sup>59</sup> but what singles out these new initiatives is their determination to replace state executives that focus on zero sum outcomes and instead seek to promote global goals. Examples include the Paris Agreement on climate change in 2015, which can be attributed to a large extent to non-state action and commitments,<sup>60</sup> and is kept alive despite President Trump's announcement of planned withdrawal from that Agreement, by several municipalities and private actors headed by California Governor Jerry Brown and the former New York Mayor Michael Bloomberg. These actors launched "America's Pledge on climate change," an effort to compile and quantify the actions of states, cities and businesses in the United States to drive down their greenhouse gas emissions consistent with the goals of the Agreement.<sup>61</sup> The Global Climate Action portal is an online platform where nonstate stakeholders from around the globe - companies, cities, subnational regions, investors and civil society organizations - can display their commitments to act on climate change.<sup>62</sup> It currently lists more than 12,500 pledges by 2,500 cities, 209 regions, over 2,100 firms and nearly 500 investors. C40, the Compact of Mayors, says that it is the world's largest cooperative effort among mayors and city officials to reduce greenhouse gas emissions and climate risks in cities.<sup>63</sup> In 2009 US Mayors

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<sup>58</sup> Now eight parliaments are demanding Zuckerberg answers for Facebook scandals:

<https://techcrunch.com/2018/11/19/now-eight-parliaments-are-demanding-zuckerberg-answers-for-facebook-scandals/>

<sup>59</sup> EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE*, Chapter 2 (2014).

<sup>60</sup> Kenneth W. Abbott, *Orchestrating Experimentation in Non-State Environmental Commitments*, 26 *ENVIRONMENTAL POLITICS*, 738 (2017).

<sup>61</sup> Jerry Brown and Michael Bloomberg Launch "America's Pledge" in Support of Paris, UNFCCC (2017), <https://unfccc.int/news/jerry-brown-and-michael-bloomberg-launch-americas-pledge-in-support-of-paris> (last visited Nov 2, 2018).

<sup>62</sup> Global Climate Action NAZCA, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://climateaction.unfccc.int/> (last visited Nov 2, 2018).

<sup>63</sup> C40 Programmes: measurement & planning, C40 CITIES, <https://www.c40.org/programmes/compact-of-mayors> (last visited nov 3, 2018).

“ratified” the Kyoto Protocol.<sup>64</sup> After the US announced that it was withdrawing from the U.N.’s Global Migration Pact for refugees and migrants, a dozen of cities in the United States joined over 130 international cities petitioning the U.N. for their formal inclusion in the U.N. global compact.<sup>65</sup> The mighty technology companies seeking to serve more users across the globe and ensure confidence in their services might find it possible to cooperate on rebuffing governments’ demands for access to their data<sup>66</sup> (as companies such as Apple<sup>67</sup> and Microsoft<sup>68</sup> have done individually) and jointly monitor offensive cyber operations. Such companies may find it both necessary and feasible to set mutually convenient standards to be enforced through institutions that they create. These motives can explain the ‘We Are Still In’<sup>69</sup> coalition of business and other non-governmental leaders committed to US compliance with the Paris Agreement despite Trump’s plan to withdraw, and efforts by coalitions of companies to engage in preventing government-sponsored spying and cybercrimes, as well as Microsoft’s suggestion<sup>70</sup> of a public-private equivalent of the International Atomic Energy Agency to handle attribution of cyberattacks to nations.

But the US-China divide may undermine such alternative multilateralism as China’s firms are heavily controlled by the Party.<sup>71</sup> In fact, such private coalitions might form to balance the emerging Chinese practice.

These developments may pass under the radar of traditional international lawyers, as these are not, strictly speaking, either “law” or “international.” But focusing on bilateralism at the level of international law might lose sight of new venues where expectations of global actors crystallise and affect users who have no opportunity for voice in such processes.<sup>72</sup> We might

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<sup>64</sup> Helmut Philipp Aust, *Shining Cities on the Hill? The Global City, Climate Change, and International Law*, 26 *Ejil* (2015).

<sup>65</sup> bethany allen-ebrahimian, *U.S. CITIES WANT TO JOIN U.N. MIGRATION TALKS THAT TRUMP BOYCOTTED FOREIGN POLICY* (2017), <https://foreignpolicy.com/2017/12/05/u-s-cities-want-to-join-u-n-migration-talks-that-trump-boycotted/> (last visited Nov 3, 2018).

<sup>66</sup> Kristen Eichensehr, *Digital Switzerland*, 167 *U. PENN. L. REV.* 18 (2019).

<sup>67</sup> Tim Cook, *A Message to Our Customers Apple* (2016), <https://www.apple.com/customer-letter/> (last visited Nov 2, 2018).

<sup>68</sup> *Microsoft v. United States*, No. 14-2985 (2d Cir. 2016)

<sup>69</sup> *We Are Still In*, <https://www.wearestillin.com/> (last visited Nov 2, 2018).

<sup>70</sup> Scott Charney et al., *From Articulation to Implementation: Enabling Progress on Cybersecurity Norms*, Microsoft Corporation (2016), <https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/REVMc8> (last visited Nov 3, 2018).

<sup>71</sup> See *infra*

<sup>72</sup> Lustig, Doreen and Benvenisti, Eyal, *The Multinational Corporation as 'The Good Despot': The Democratic Costs of Privatization in Global Settings* (April 15, 2013). Available at SSRN: <https://ssrn.com/abstract=2251439> or <http://dx.doi.org/10.2139/ssrn.2251439>

need to expand our vision of “international law” as a field to be able to map and assess the new multilateral norms that will guide our behaviour.

#### **IV. Concluding Thoughts about the Future of Multilateralism and of International Law**

A number of speculative predictions:

- (a) The rise of exit as undermining trust in international obligations?
- (b) Reduced space for international lawmaking by international courts not controlled by the hegemons.
- (c) Increased authority for ILC de facto legislation (e.g. state and IO responsibility, subsequent practice in treaty interpretation, finding customary international law).
- (d) The rise of illiberal international law (e.g. unregulated cyberspace, introduction of autonomous weapons, demise of ICL).
- (e) Increased transnational lawmaking by national courts not controlled by hegemons, relying on domestic law and private international law rules (Urgenda, Vedanta).

A number of theoretical observations:

- (1) How do we understand the theoretical explanations offered at the time for the turn to intergovernmental multilateralism?
- (2) Can we understand prevalent explanations as serving US interests?
- (3) Revisiting Constructivism